

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**August 3, 2005**

**IN RE:**

**PETITION FOR INTERCONNECTION BY CINERGY ) DOCKET NO.**  
**COMMUNICATIONS COMPANY AGAINST ) 01-00987**  
**BELLSOUTH TELECOMMUNICATIONS, INC. )**

---

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

---

This matter came before Chairman Pat Miller, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the panel of Arbitrators (the "Panel") assigned to this Docket, at a regularly scheduled Authority Conference held on May 16, 2005 for consideration of the *Motion for Summary Judgment* ("Motion") filed by Cinergy Communications Company ("Cinergy").

**BACKGROUND**

On November 9, 2001, Cinergy filed the *Petition for Interconnection by Cinergy Communications Company Against BellSouth Telecommunications, Inc.* ("Petition") seeking arbitration by the TRA of unresolved issues between Cinergy and BellSouth Telecommunications, Inc. ("BellSouth") (collectively, the "Parties") in the renegotiation of the existing interconnection agreement between the Parties.

In an order issued February 26, 2002, the Panel accepted Cinergy's *Petition*, agreed to serve as arbitrators, and appointed the Authority's General Counsel or his designee to serve as Pre-Arbitration Officer and to prepare the matter for hearing.<sup>1</sup>

On March 27, 2002, the Parties filed a joint issues matrix which contained five issues:

Issue 10 -- Should BellSouth be required to provide Cinergy Communications nondiscriminatory access to unbundled packet switching in areas where BellSouth has deployed remote terminals in its network?

Issue 11 -- Should BellSouth be required to offer unbundled packet switching as a UNE?

Issue 12 -- Should BellSouth be required to offer Line Splitting -- access to the High Frequency Portion of the Loop (HFPL) -- when Cinergy Communications purchases UNE-P loops from BellSouth to provide local service?

Issue 13 -- Should BellSouth be required to include packet switching functionality as part of the UNE platform, (referred to as UNE-P)?

Issue 14 -- Should BellSouth be prohibited from requiring credit card billing of its Advanced Service customers when Cinergy Communications provides the underlying voice service to the same end user?<sup>2</sup>

On September 9, 2002, Cinergy filed a letter stating that the Parties had agreed that a hearing on the *Petition* should be postponed pending the outcome of a generic proceeding regarding issues relating to BellSouth's provision of digital subscriber line ("DSL") service over a UNE platform ("UNE-P") loop.

This Docket remained inactive based on that agreement until May 4, 2004, when Cinergy requested that the Docket be reactivated and filed its *Motion* on the issue of BellSouth providing DSL service over a UNE-P loop because the generic proceeding had not been initiated. In its

---

<sup>1</sup> See *Order Accepting Arbitration, Appointing Arbitrators and Appointing Pre-Arbitration Officer* (February 26, 2002)

<sup>2</sup> See Letter from Guy M. Hicks, Counsel, BellSouth Telecommunications, Inc. to David Waddell, Executive Secretary, Tennessee Regulatory Authority (March 27, 2002) (issues matrix attached)

*Motion*, Cinergy argued that the *TRO*<sup>3</sup>, the new rules<sup>4</sup>, and BellSouth's own tariffs require that BellSouth allow Cinergy to commingle or combine an unbundled network element or combination of unbundled network elements, such as UNE-P, with wholesale access services, such as DSL, and provide both voice and broadband services to a customer over one line.<sup>5</sup>

On May 6, 2004, BellSouth filed a letter requesting that the Authority establish a briefing schedule regarding Cinergy's *Motion*. BellSouth filed its *Response of BellSouth Telecommunications, Inc. to Cinergy's Motion for Summary Judgment* ("Response") on May 27, 2004. BellSouth argued in its *Response* that Cinergy was attempting to relitigate issues that had already been decided by the FCC in the *TRO* and by the Authority in a previous docket.<sup>6</sup> BellSouth argued that the Authority's ruling in *DeltaCom* is consistent with the *TRO* that incumbent local exchange carriers ("ILECs") should not be required to provide broadband service to the UNE-P voice customers of the competing local exchange carriers ("CLECs"). BellSouth also asserted that Cinergy's commingling argument is pending before the FCC and Cinergy's interpretation is inconsistent with the *TRO*. Further, the commingling issue should be addressed by the FCC not the TRA.

---

<sup>3</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F C C R. 16,978 (2003), corrected by Errata, 18 F C C R. 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v FCC*, 359 F 3d 554 (D C Cir 2004), cert denied, 125 S Ct 313, 316, 345 (2004) ("Triennial Review Order" or "*TRO*")

<sup>4</sup> 47 C F R § 51.309 (2005) ("new rules")

<sup>5</sup> *Motion for Summary Judgment*, p. 1 (May 4, 2004)

<sup>6</sup> *In re Petition for Arbitration of ITC^DeltaCom Communications, Inc with BellSouth Telecommunications, Inc Pursuant to the Telecommunications Act of 1996*, Docket No 03-00119, Transcript of Proceedings (June 21, 2004) (hereinafter "*DeltaCom*")

On June 23, 2004, Cinergy filed its *Reply of Cinergy Communications Company*<sup>7</sup> in which it asserted that the FCC's new rules were clear that ILECs must permit requesting carriers to commingle a UNE or combination of unbundled network elements with wholesale services obtained from the ILEC.<sup>8</sup>

On September 30, 2004, the Pre-Arbitration Officer contacted the Parties noting that the Parties had apparently agreed that Issue 12 should be resolved separately from the other issues in this arbitration, and requesting that the Parties provide an explanation for proceeding with a resolution of Issue 12 separately from the other issues in dispute.

The Pre-Arbitration Officer issued an *Order* directing the Parties to jointly file a revised joint issues matrix identifying all issues that remain open in this docket or, in the alternative, file an explanation in support of proceeding with a resolution of Issue 12 separate from and prior to addressing the other issues that remain open in this arbitration.<sup>9</sup>

On November 17, 2004, the Parties filed a letter to the Pre-Arbitration Officer stating that both Parties agree that Issue 12 (DSL over UNE-P) is the only remaining issue and requesting that oral arguments be held not less than 45 days from November 17, 2004 because of recent and anticipated developments before the FCC.

BellSouth submitted a letter on February 18, 2005 advising the Authority of a recent federal court decision that strongly supports BellSouth's arguments regarding the DSL over UNE-P issue.<sup>10</sup> In the federal case cited by BellSouth, the ILEC appealed a state public service commission decision. The federal district court found that the state commission arbitration

---

<sup>7</sup> The Pre-Arbitration Officer granted permission to Cinergy to file a reply pursuant to TRA Rule 1220-1-2-06. See *Order Granting Cinergy's Request to Reply to the Response of BellSouth Telecommunications Inc. to Cinergy's Motion for Summary Judgment* (June 21, 2004).

<sup>8</sup> See 47 C.F.R. § 51.309(d)-(f).

<sup>9</sup> *Order Directing Filing of Revised Joint Issues Matrix* (November 10, 2004).

<sup>10</sup> See *Wisconsin Bell Inc. v. AT&T Communications of Wisconsin, L.P.*, No. 03-C-671-S (W.D. Wis.) (July 1, 2004).

decision requiring an ILEC to provide data services to CLEC UNE customers was contrary to the FCC's regulations and thus inconsistent with federal law. On February 25, 2005, Cinergy filed a letter with the TRA asserting that BellSouth's February 18, 2005 filings should carry no weight in this proceeding.

Pursuant to a *Reminder Notice of Oral Argument* issued on March 11, 2005, the Parties presented oral arguments on Issue 12 to the Panel. During oral arguments held on March 14, 2005, the Parties discussed the potential impact of an anticipated *Order* from the FCC on the issue in this docket. The Panel determined that the Parties could comment regarding the *Order* upon entry provided the order is issued in the near future.

On March 25, 2005, the FCC issued an *Order* in WC Docket No. 03-251.<sup>11</sup> Given the relevance of the *FCC Order*, the Authority issued a *Notice of Filing* on March 28, 2005 requesting comments on the impact of the *FCC Order* on this proceeding. BellSouth and Cinergy provided comments on April 11, 2005.

### **Effect of the FCC Order**

In its comments filed on April 11, 2005, Cinergy notes that the FCC ruling in the *Order* concerning commingling effectively moots Cinergy's argument in its *Motion for Summary Judgment*.<sup>12</sup> Cinergy states the *Order* contains a *Notice of Inquiry* to determine if bundling DSL with voice services harms competition.<sup>13</sup> Cinergy claims that the Authority has "clear jurisdiction to consider the substantive merits of Cinergy's argument that BellSouth's policy of refusing to sell DSL over a UNE loop should be prohibited as an anti-competitive, tying

---

<sup>11</sup> *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, FCC 05-78, WC Docket No. 03-251 (*Memorandum Opinion and Order and Notice of Inquiry*) 20 F C C R 6830 (March 25, 2004) (hereinafter "*Order*" or "*FCC Order*")

<sup>12</sup> Letter from Henry Walker, Counsel, Cinergy Communications Company to Chairman Pat Miller, p. 1 (April 11, 2005)

<sup>13</sup> *Id.* at 1

arrangement that deprives customers of choice and inhibits the development of new services such as VoIP.”<sup>14</sup> Finally, Cinergy requests the establishment of a procedural schedule to file new testimony and bases its request on the fact that existing testimony is over three years old and does not contain information addressing the impact of BellSouth’s policy on selling DSL on VoIP.<sup>15</sup>

BellSouth asserts that the *Order* “preempts state commission decisions that required BellSouth to provide wholesale or retail DSL over UNE loops leased by CLECs.”<sup>16</sup> BellSouth further claims that the FCC expressly rejected Cinergy’s commingling argument, the sole argument presented in Cinergy’s *Motion*.<sup>17</sup>

#### **The May 16, 2005 Authority Conference**

At a regularly scheduled Authority Conference held on May 16, 2005, the Panel considered Cinergy’s *Motion* as well as the letters filed by Cinergy and BellSouth regarding the impact of the FCC’s *Order*. In its *Motion*, Cinergy relies on the FCC commingling rules contained in the *Triennial Review Order* to assert that BellSouth must offer its retail DSL product to Cinergy’s UNE-P customers. The Panel found that the FCC explicitly rejected this claim. In its *Order* of March 25, 2005, the FCC states, “Based on the language and clear intent of the *Triennial Review Order*, we reject Cinergy’s assertion that our commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility.”<sup>18</sup> Given the FCC’s unambiguous rejection of Cinergy’s commingling argument, the Panel voted unanimously to deny Cinergy’s *Motion*.

---

<sup>14</sup> *Id*

<sup>15</sup> *Id*

<sup>16</sup> Letter from Guy Hicks, Counsel, BellSouth Telecommunications, Inc to Chairman Pat Miller, p 1 (April 11, 2005)

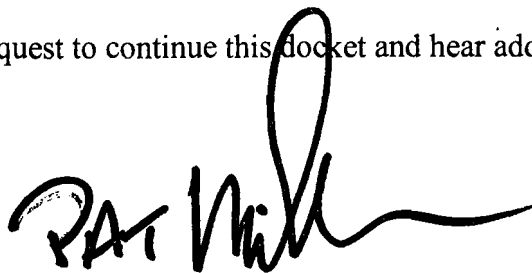
<sup>17</sup> *Id*

<sup>18</sup> *FCC Order* at ¶ 35

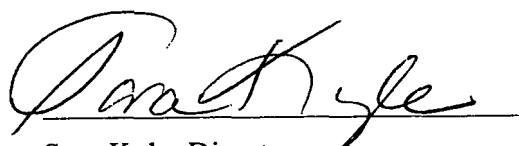
In addition, the Panel found that Cinergy's request to continue this Docket is predicated on the FCC's *Notice of Inquiry* to examine the competitive effect resulting from the bundling of voice and data services. Although the FCC continues to evaluate this matter relative to anticompetitive effects, its main emphasis is on reaching a decision on broadband deployment. Because the only remaining issue in this Docket, Issue 12, was answered by the FCC's *Order*, the Panel found no reason to continue this docket and voted unanimously to deny Cinergy's request to continue this docket and to hear additional testimony.<sup>19</sup>

**IT IS THEREFORE ORDERED THAT:**

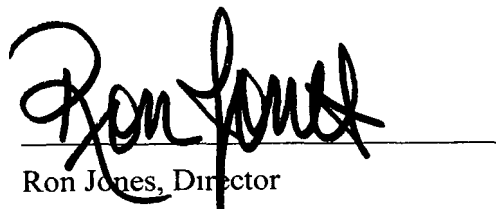
1. Cinergy Communications Company's *Motion for Summary Judgment* is denied.
2. Cinergy Communications Company's request to continue this docket and hear additional testimony is denied.



Pat Miller, Chairman



Sara Kyle, Director



Ron Jones, Director

<sup>19</sup> Director Jones noted that, with respect to the *Notice of Inquiry*, Cinergy may file comments with the FCC on the broader questions raised in Paragraph 37 of the *Order* regarding the tying or bundling of services. After doing so, Cinergy can make subsequent filings with the Authority as its interests require.